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In the Supreme Court
of the United States.

October Term, 1903.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

THE AMERICAN BOOK COMPANY,
Plaintiff in Error,

vs.

THE STATE OF KANSAS, *ex rel. Galen Nichols, County Attorney of Shawnee County,*
Defendant in Error.

No. 126.

BRIEF FOR DEFENDANT IN ERROR.

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Attorney-general.
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BRIEF FOR DEFENDANT IN ERROR.

BEFORE proceeding to discuss the merits, we shall briefly reply to the brief of plaintiff in error in opposition to our

MOTION TO DISMISS.

The facts are undisputed. Before suing out this writ of error the plaintiff in error had fully performed the judgment it seeks to reverse; had fully complied with the law it seeks to annul, and was, as it still is, in the full enjoyment of the

fruits of that compliance and performance. Were the judgment reversed, that reversal could have no practical effect whatever so far as *this* case is concerned, and *this* is the only case at present before the court. The plaintiff in error does not deny this, and it expressly admits the rule laid down by this court in such cases (brief, p. 35); but it seeks to escape the consequences by affirming that this court might "declare principles or rules of law" which, while they "cannot affect the matter in issue in the case before it" (Mills v. Green, 159 U. S. 651–653), would be convenient to have for use in *another* case. This court has heard that appeal before, but to this date it has produced no effect upon the judicial heart. In California v. San Pablo & Tulare Railroad Co., 149 U. S., the attorney-general of California "contended that a determination of the question whether the tax was valid was of the utmost importance to the people of the state," and, besides, "stipulations had been made in other similar cases that they should abide the judgment of this court" in that case; but this court was deaf to the appeal and contented itself with the declaration:

> "This court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

If the court should ever deviate from this rule, surely the case of Kimball v. Kimball, 174 U. S. 153, presented a strong reason for deviation, but the rule was inflexibly applied.

The only controversy here was whether the plaintiff in error was compelled to comply with the state law in order to be entitled to carry on its business in the state. The supreme court of the state, in the judgment brought here, ruled that question against the plaintiff in error. It thereupon fully complied with the law and was admitted to carry on business in the state; it has its certificate to that effect from the state's Charter Board, and the controversy, so far as this case is concerned, is at end. Nothing this court could do in this case could be of any benefit whatever to the plaintiff in error, *so far as this case is concerned*. True, counsel claim that "the American Book Company is still under the stress of this statute" (brief, p. 37), but it is not "under the stress of this statute" *in this case*. In the two cases referred to above, the parties were considerably "under the stress" of disagreeable things, but that seems to have made no difference with this court.

In the case now pending in the supreme court of Kansas, we make use of that judgment for two purposes only: As concrete proof of a fact obviously capable of other readily accessible evidence —that when the transactions with the State Text-

book Commission took place the American Book Company had not complied with the Bush corporation act; and that the alleged acts of the state's officers do not estop the state from questioning the validity of the contracts which the State Text-book Commission assumed to make; a proposition in support of which, regardless of the judgment, we cite in our brief abundant authority, including the decisions of this court. We make no other use of the judgment, and we do not even refer to it *as* a judgment essential to the state's right to judgment in the pending case. Were the judgment reversed, the reversal could have no effect on the case now pending in the supreme court of Kansas, as this court long ago decided.

THE MERITS.

What the Case Was.

Although somewhat obscured by a parade of federal questions and a shrewdly constructed brief on the other side, the question in this case —for there is but o —is simple, and not difficult of solution.

In 1897 the legislature of Kansas created a State Text-book Commission to select text-books for all the public schools of the state for a period of five years. Bids were to be received from publishers, contracts were to be executed with the successful bidders, and they were to give bonds for the performance of their contracts; thereupon

the governor was to issue his proclamation announcing the result, and it was made unlawful to thereafter use in the public schools any but the selected books during the life of the contracts. Books previously in use were to be accepted in exchange at a certain rate. The act contained these provisions pertinent here:

"Within thirty days after the issuing of the proclamation by the governor of this state provided for in this act, any person, persons, company or corporation having contracted for the furnishing of school text-books to the people of this state, for use in the public schools thereof, shall arrange with at least one dealer or agent at the county-seat in each county in this state for the handling, sale and exchange of the school-books provided for in this act. Such dealer or agent shall be allowed to charge the people of this state a commission not exceeding ten per cent. on the contract price, established in this act for the handling and sale of such books: *Provided*, That any person, company or corporation having a contract under the provisions of this act shall be required to furnish books to any citizen or school district in Kansas at the same price and on the same terms as provided for the furnishing of such books to dealers or agents, in cash orders of not less than ten dollars each, and deliver the same at any railroad station in Kansas mentioned in such order."

"At the annual meeting to be held in the various school districts in this state in 1897, and at each annual meeting thereafter, and at the meeting of the board of education of cities of the first or second class, an estimate shall be made of the number of school text-books needed in each of said schools for the term next commencing therein,

and the clerk of each school district and the clerk of the board of education in each city of the first or second class shall report the same to the county superintendent of public instruction immediately, and not later than the 1st day of August next thereafter; and the county superintendent of public instruction shall, as soon as possible, and not later than August 10 of each year, and oftener if the necessity of the schools require it, make out his requisition from the reports so received, and from other sources, and send it to the school-book publisher or publishers having contracts under the provisions of this act, stating therein the number of books of each kind needed for the schools of such county."

"Every contract with any person, company or corporation, publisher or publishers of school text-books for use in the schools of this state shall be for five years from the date thereof; and no school-district board or board of education of any city of the first or second class shall adopt, use or permit to be used any other school text-books than those provided for in this act."

"Any person or persons who shall directly or indirectly demand or receive any money, promise or any other thing of value for any book or books provided for in this act in excess of the contract-price, together with ten per cent. herein provided for for dealers or agents, and any member of any such district board, or any member of any school board in any city of the first or second class, or any teacher of any school, who shall adopt, use or permit to be used, or cause to be used in any public school of this state, any other text-book or books than those provided for in this act, shall be deemed guilty of a misdemeanor, and upon conviction in any court of competent jurisdiction shall be fined in any sum not less than twenty-five dollars or more than one hundred dollars, or

by imprisonment in the county jail not to exceed ninety days, or by both such fine and imprisonment: *Provided,* That in estimating the price at which the dealers or agents may sell books under the provisions of this act, the total amount of each sale shall not vary to exceed one-half of one cent above the contract-price, plus ten per cent. provided for herein."

Kan. Gen. Stat. 1901, §§6467, 6468, 6471, 6477.

At the special session of 1898 the legislature enacted what is known as the "Bush corporation law," a copy of which is appended to the brief for the plaintiff in error, requiring foreign corporations "seeking to do business" in Kansas to make application to the State Charter Board, created by that act, and to do certain things, including the payment of a charter fee graduated according to the amount of their capital stock. At the quinquennial session of the State Textbook Commission, in May, 1902, the plaintiff in error, a New Jersey corporation, not having fully complied with the Bush corporation law, submitted bids for school-books to be furnished for the next five years, and its bids were accepted as to forty-five per cent. of all the text-books to be supplied. We may assume that it was supposed there was "something rotten in Denmark," for the county attorney of Shawnee county, the county in which the capital of the state is situated, promptly instituted a suit in the district court of that county to prevent the signing of the

contracts. He was too late, however, for the officers, moving with great diligence, had already signed them. But the governor had not yet issued his proclamation, and, June 7, 1902, the same county attorney brought this action in the supreme court of the state to oust the plaintiff in error and to cancel the contracts. The supreme court held that it had no jurisdiction to entertain a suit for the cancellation of the contracts, but rendered a judgment ousting the company "from the exercise of the right to transact business as a corporation *in the state of Kansas*" until it should comply with the Bush law.

The action was brought under a provision of the Kansas code of civil procedure, which, so far as important here, is as follows:

"The writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, are abolished, and the remedies heretofore obtainable in those forms may be had by civil action.

"Such action may be brought in the supreme court or in the district court in the following cases:

"*Fourth*. When any corporation *exercises powers not conferred by law*."

Gen. Stat. 1901, §§ 5148, 5149.

The petition avers that the American Book Company is a corporation incorporated under the laws of New Jersey, and then alleges:

"That for more than three years past, said American Book Company *has exercised and still does exercise*, in the state of Kansas and in the

county of Shawnee, *certain corporate powers not conferred upon it by law*, . . . to wit: The corporate power of making, entering into and signing contracts in the said state with school boards, the Kansas School Text-book Commission, and other persons resident of Kansas, for the sale, supplying and furnishing of text-books and the actual furnishing of school-books for use by the pupils of the state of Kansas; the said company during the month of May, 1902, entered into a contract with the Kansas State Text-book Commission, in said county and state, for the furnishing of certain school-books, for use in the schools of Kansas, for the ensuing five years, by the terms of which said contract the said defendant has secured the right to furnish certain books for use in the schools of the state of Kansas from said State Text-book Commission, and is now doing business in the state of Kansas, and is carrying out its said contract by placing the stocks of books in the different counties for sale under said contract, in all of which said business in the sale of its said books, and in the entering into of the contract so described with the said Text-book Commission, and the doing of said business, the said American Book Company was acting and is now acting in said county in violation of chapter 23 of the General Statutes of the state of Kansas of 1902, and the said defendant has unlawfully and wilfully persisted in the violation of the provision of said laws in this, to wit": [Setting forth the particulars in which the company had not complied with the Bush corporation act.]

The prayer is:

"Wherefore the said county attorney, on behalf of said state, prays that the said defendant be required to show by what warrant or authority it exercises corporate rights and enters into and transacts business as a corporation in the state of

Kansas; and *that it may be ousted forever from the exercise of such usurped corporate power*, and that the contract entered into with the Kansas Text-book Commission may be declared null and void, and for such other relief as may be proper, and for the cost of this proceeding."

(Printed record, pp. 1, 2.)

We shall see, as we proceed, that it was matter of judicial knowledge, because matter of public law, that, at the date this petition was filed, an *existing* contract with a school board, or with any person or body save the State Text-book Commission, for the supplying of school-books to the public schools of Kansas, was a legal impossibility. So this petition charged, as the only exercise of corporate power, the making of the contracts of 1902 with the State Commission and placing stocks of books in the counties in pursuance and in performance of those contracts.

The answer denied the petition except as its allegations might be admitted or the denial be qualified by other parts of the answer; and then admitted that the company was a New Jersey corporation, as alleged, and that "on or about the 31st day of May, 1902," it "duly executed certain contracts in writing with the Kansas State Text-book Commission, "copies of which were attached and made part of the answer; that it had executed a bond for the performance of these contracts, which bond had been approved by the

Executive Council of the state; and that it had made certain bids which the Text-book Commission had accepted and which were the basis of these contracts. The answer further alleged that the company had incurred large expense in preparing to perform these contracts, although they had not yet been consummated by a proclamation of the governor, required to put them in force. It was also alleged that the company had some unexpired contracts with school-district boards, for which it claimed the protection of the contract clause of the federal constitution—a matter which, as we shall see, dropped out of the case. Thus far, the answer, as will be observed, admitted all the material allegations of the petition except only the allegations of failure to comply with the Bush corporation act, concerning which, besides pleading estoppel because of the interpretation put upon the act by the attorney-general and the Charter Board, of which he was a member, it alleged:

"The defendant, further answering, says that it has duly complied with all the requirements of the laws of the state of Kansas affecting foreign corporations; has duly filed with the secretary of state its irrevocable consent to be sued in the courts of the state and duly filed with the secretary of state, on or about the 30th day of May, 1902, the annual report of its business, and has received from said secretary of state a certificate *of said facts*, and is thereby authorized to do business in the state of Kansas."

Interstate Commerce.

Up to this point there was nothing in issue but the question, partly of fact and partly of law, whether the company had complied with the Bush corporation act. But the third paragraph of the answer injected into the case, or sought to inject into it, an additional element. That paragraph was as follows:

"And this defendant, further answering, says that at the time of bringing this suit, and now, the business of this defendant within the state of Kansas was and is solely that of interstate commerce. That the only business of any character transacted by this defendant within the state of Kansas has been, and is, that of selling school text-books, reference books, and other publications, to dealers and merchants in the state of Kansas. That this defendant is the owner of certain copyright and prepares and manufactures its own books and publications. That for such purposes this defendant owns and operates in Cincinnati, Ohio, Chicago, Ill., and New York city, certain factories and binderies, wherein the type for its publications is set and the same are completely printed, bound, and prepared for sale and transportation to customers. That this defendant does not now, and did not at the time of bringing this suit, own any property connected with the manufacture and sale of said business within the state of Kansas, *nor any other property whatsoever within the said state.* That this defendant has been, and is now, engaged in selling its said publications to dealers and merchants located at various points in the state of Kansas and other states of the United States, and, in making such sales, packs and ships its said publications over appropriate railroads, consigned to the persons to

whom they are sold, and delivers them to the consignees in the original packages in which they were packed for shipment. That with reference to the state of Kansas all sales of such merchandise made by this defendant are of goods manufactured and shipped from points in other states to points within the state of Kansas and there delivered in the original packages to such purchasers. That this defendant, prior to the passage of the act of 1898, made and executed certain contracts with school districts fixing the price at which this defendant would sell certain publications to the public, which said contracts continued in force at the time of the passage of the said act, and some of which are still in force. That the only purpose and scope of said contracts was the fixing the price at which publications might be sold and delivered by this defendant to such dealers or persons as might thereafter choose to buy. And such contracts are merely incidental features of the interstate business of this defendant hereinbefore set out. That such has been the sole character of the business in which this defendant has been engaged in the state of Kansas for many years last past, and said defendant was engaged in such business at the time of the passage of chapter 10 of the Session Laws of 1898.

"And this defendant, further answering, says that by reason of the premises chapter 10 of the Special Session Laws of Kansas for the year 1898, and chapter 125 of the Session Laws of 1901, do not apply to this defendant, and this defendant is not amenable thereto. That if said statutes be construed as applicable to this defendant, then the same are in violation of the provisions of section 18 of article 1 of the constitution of the United States, in that they seek to regulate and impose burdens and restraints upon interstate commerce, and this defendant hereby expressly

invokes the protection of the said section of the constitution of the United States."

(Printed record, pp. 16, 17.)

If, as is the case, it is as true of decisions of federal questions as of other questions that judgments are not to be reversed for error *without prejudice*, what is to be done with the assignment of error that the supreme court of Kansas gave no heed to this defense? In every interstate-commerce case yet decided here, there has been something *within the state* upon which the obnoxious law could operate. This is true of *every* case cited or quoted by counsel for the plaintiff in error. A drummer, a solicitor of orders, or a *local* agent of some kind was to be fined or imprisoned; the opening of an office in the state was forbidden, under penalties to be inflicted upon the person *within the state* who did the wicked deed; or taxes were to be collected from property *within the state*. This company avers that it has no property "whatsoever" within the state of Kansas. As the fact is not alleged, it must be assumed that the company does not do business through local agents and that no persons solicit orders for it in the state. People purchase books of its home offices, possibly by going there in person, and they are shipped direct to the purchaser in Kansas without the intervention of anybody but the carrier. Under these peculiar circumstances, of *whom*, of *what*, could the Kansas law lay

hold and disturb the serenity of interstate commerce? Obviously the purchaser and the carrier are the only *persons* within the state engaged in the nefarious traffic; and the books *in transit* are the only *things* of which the law could lay hold. *The company* is beyond the reach of the grasping commonwealth pictured in the brief of counsel for the plaintiff in error. The state does not attempt to forbid the citizen from purchasing books nor from having them sent to him. It denounces no punishment against the carrier. It seeks not to confiscate the goods, in transit or after. If the third paragraph of the answer is true, then, pray how could this company be injured by the most stringent enforcement of this law? How can this law, so far as the plaintiff in error is concerned, put the slightest obstacle in the way of interstate commerce? It seems to us the plaintiff in error has pleaded too hard; and that, if error it is, the first error assigned is error without prejudice. There is no such case in the reports from the organization of this court. According to the plaintiff in error, assuming its answer in this respect to be true, the state is fighting a shadow—is engaged in a struggle with the circumambient atmosphere. To this conflict we might apply a little of Shakespeare:

The State of Kansas: "I can call spirits from the vasty deep."

The American Book Company: "But will they come?"

True, there is a provision in the Bush law that a corporation shall not be allowed to sue in the courts of the state unless it shall have done certain things. But this applies to *all* corporations for profit, domestic as well as foreign, and whether they have originally complied with the law or not, and relates to a *subsequent* matter, not to the acquisition of the right to do business in the state. The validity of that provision was not involved or decided in this case; and the right to sue in the courts of a state must be derived from another provision of the federal constitution—it has never been held to be within the protection of the commerce clause.

If the third paragraph of the answer is true, and of course, for the purposes of this assignment, it must be taken as true, the plaintiff in error is immune so far as the Bush act is concerned. It is not itself within the state; it has no local agents; it has no property "whatsoever" within the state's reach.

Indeed, the paragraph is a reasonably good Irish bull. The company says: "The only business I have ever done *in Kansas* has been done in *Illinois, Ohio, and New York!*" For, as we shall see, according to the decisions and fixed law of the very court in which this answer was filed, the business described in this paragraph was business done in the state whence the goods were shipped—not in the state of Kansas.

This judgment was not rendered by a mere *nisi prius* tribunal. It was rendered by the highest court in the state—the court whose decisions are *law*, binding not only upon citizens but upon the court itself. Hence, the judgment is to be interpreted in the light of the law of the state as settled by previous decisions of that court. It is not to be treated as a thing apart. By that judgment the plaintiff in error is "ousted from the exercise of the right to *transact business* as a corporation *in the state of Kansas* until," etc. What does "transact business *in the state of Kansas*" mean? We must suppose an application made to the supreme court to enforce this judgment. Suppose such an application made upon the very facts pleaded in the third paragraph of this answer: what would the court say? It has already said, and what it has said interprets this judgment. It had decided shortly before the rendition of this judgment that just such transactions as are pleaded in the third paragraph of this answer are transactions at the place of shipment—not transactions in the state of Kansas.

The State v. Cairns, 64 Kan. 782.

Williams v. Davidson, 64 id. 707.

Feineman v. Sachs, 33 id. 631.

(See, also, Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727, 736, 737; Allgeyer v. Louisiana, 165 U. S. 578; 13 Encycl. of L., 2d ed., 870, and cases cited.)

Hence, according to the law as settled for the state by its supreme court before this action was begun, the third paragraph of the answer amounted to no more than a denial that the plaintiff in error was, or ever had been, doing business *in the state of Kansas*. Beyond doubt, the business described is interstate commerce; but equally beyond doubt, it was not business done in the state of Kansas. Had this action been brought by the state of Illinois, in that state, to oust the company from doing business *there*, this would have been a pertinent defense, for ouster would have destroyed the company's business; but in the actual case, what matters it that the business was interstate commerce if it was not business done in Kansas? If a federal question is raised and decided against the party raising it, that, without regard to the correctness of the decision, gives this court jurisdiction; but, in the exercise of that jurisdiction, it will not reverse the judgment, though erroneous as to the federal question, if the judgment should or might have been the same because of general principles of law, regardless of the federal question. In short, if the decision of the federal question was not necessary to the decision of the case, the judgment will not be reversed because the federal question was erroneously decided. Not only so, but if it is apparent that, in case of reversal on the federal question, the state court

will still have the right to decide the same way and render the same judgment on general grounds, regardless of the federal question, the judgment will not be reversed, although in its decision under review the state court did not decide the general question which was open to it on the record.

"Why should a judgment be reversed for an error in deciding the federal question, if the same judgment must be rendered on the other points in the case? And why should this court reverse a judgment which is right on the whole record presented to us; or where the same judgment will be rendered by the court below, after they have corrected the error in the federal question?"

Murdock v. Memphis, 20 Wall. 590.

This is the only part of the answer which sets up and claims the protection of the commerce clause of the constitution. Although the contracts made with the State Text-book Commission are fully pleaded, interstate commerce is not alluded to in that connection. So, if the third paragraph of the answer was not, *on general principles*, a defense to the action, the interstate-commerce question, though decided below, is not open for consideration here. And we think we have shown that, *on general principles*, it was not a defense.

Obligation of Contracts.

For several years school-district boards had possessed the power to adopt text-books and to make a species of contracts concerning them for a period of five years; but, in 1884, an act was passed making provision for county uniformity, and expressly repealing the provision which had given district boards this power.* Hence, no contract *with a school-district board* could have been in force after 1889. After the act creating the State Text-book Commission took effect, March 19, 1897, of course no school-book contract could be made otherwise than with that commission.

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*"The district board, each board of education, and each and every school district board, shall require a uniform series of text-books to be used in each separate branch of study in each school. But each board shall determine for itself, within six months from the passage of this act, the particular series of text-books which shall be used; and when such selection of text-books shall hereafter be adopted and introduced in pursuance of the provisions of this act by said boards, no change shall be made for a period of five years from the date of such introduction of any particular series of text-books, unless four-fifths of the legal voters of any such district shall petition for a change in the series of text-books adopted." (Session Laws 1879, ch. 157, § 1.)

"Section 1 of chapter 157 of the Laws of 1879 is hereby repealed." (Session Laws 1885, ch. 171, § 10.)

"School districts may, at their annual meetings for the election of school officers, indicate by a majority of all the votes cast at such meeting their desire for a county uniformity of text-books, which vote shall be transmitted to the county superintendent of public instruction by the clerk of the aforesaid school district, within ten days from the time of such vote.

"Whenever a majority of all the districts of a county in any one year shall indicate as in section 1 their desire for a county uniformity of text-books, the county superintendent of public instruction shall notify the districts of such vote, and at the same time call for one delegate from each municipal township and city of the third class in the county, to be elected at a meeting of the school boards of such township, on a day and at a place and hour specified in said call.

"The delegates so elected shall constitute a county text-book board, whose duty it shall be to select and prescribe the text-books to be used in each branch of study required by law to be taught in the public schools.

"No text-book shall be prescribed in pursuance of the provisions

The very last day, therefore, upon which a contract could have been made, even with a *county* text-book board, was March 18, 1897, and as it could have been for no longer period than five years, and could not have been renewed or extended, it must have expired March 18, 1902. As we have seen, contracts with the State Commission itself are for just five years, and as it let its first contracts in April, 1897, even its contracts must have expired in April, 1902. This action was brought June 7, 1902, when it was legally impossible that there could have been a single existing school-book contract of any character; yet the plaintiff in error pleaded in its answer:

"That this defendant, prior to the passage of the act of 1898, made and executed *certain con-*

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of this act unless the publishers thereof shall have first filed with the county superintendent of public instruction a guarantee of its price, quality and permanence of supply for five years, together with a good and sufficient bond for the faithful compliance with said guarantee, conditioned in such sum as the county text-book board may determine and approve.

"The county superintendent of public instruction shall be *ex officio* chairman of said county text-book board, and shall furnish each school district a list of the text-books selected and prescribed, in pursuance of the provisions of this act, which list shall be posted by the district clerks in their respective schoolhouses; and said list shall comprise the only legal text-books for the schools of said county, and it is hereby required of the school board to conform to the said lists in the text-books prescribed for use in their schools.

"When a uniformity of text-books shall be adopted in any county in pursuance of the provisions of this act, no change shall be made in such county for a period of five years from the date of such adoption of any particular series of text-books." (Session Laws 1885, ch. 171, §§ 1, 2, 4, 5, 6, 9.)

The act just quoted from absolutely repealed the provision conferring power upon district boards to select books, and thereafter, from 1885, contracts could be made only with county text-book boards, whether such boards had come into existence in some counties or not. In short, after 1885, contracts could not be made by district boards. Their authority had been expressly taken away.

tracts with school districts, fixing the price at which this defendant would sell certain publications to the public, which said contracts continued in force at the time of the passage of the said act, *and some of which are still in force*. That the only scope and purpose of said contracts was the fixing of the price at which publications might be sold and delivered by this defendant to such dealers or persons as might thereafter choose to buy. . . . And further answering, this defendant says, that if the said act of 1898, as amended, be construed as applicable to this defendant, and to authorize the court in this proceeding to grant the judgment of ouster therein prayed, then the said act is in violation of section 10, article 1, of the constitution of the United States, in so far as it attempts to interfere with the due performance by this defendant of its contracts made and entered into prior to the passage of said act, which are in force, it being a law impairing the obligation of contracts, and this defendant expressly invokes the protection of the constitution of the United States in that behalf."

(Printed record, pp. 17, 18, 111, 111½.)

This is all. With *what* school districts were contracts made? *When* were they made? What were their terms? Were they such contracts as school districts could lawfully make? Were they *contracts* at all? The court below was not, this court is not, permitted to answer these questions. From facts locked up in his own bosom, the pleader says there were *contracts*, and with his legal conclusion courts must rest content. *Facts* must be pleaded from which a court can see *for itself* that contracts existed before it can be

claimed with success that the obligation of contracts has been impaired. This is not to be assumed, nor is the mere word of the pleader to be taken for it. How many such contracts were there? When would they have expired?

But let us dismiss this. No such matter was in issue; no such question was decided. The opinion shows that no such question was decided. The pleadings show that no such question was in issue. But, aside from that, the case was disposed of at last with the distinct understanding of court and counsel that if any such school-board contracts *were* still in existence they were not to be affected by the judgment. A statute requires the supreme court of Kansas to make a complete record in all original cases, so that all that appears here is preserved as a permanent record by the supreme court of Kansas and modifies or qualifies its recorded judgment.

Counsel are not altogether ingenuous in their criticism of the supreme court of Kansas for not recollecting these alleged contracts in its judgment. They do not state all that occurred, but, singling out one remark of the chief justice, base all their comment upon that. Here is more of the colloquy:

CHIEF JUSTICE DOSTER: "You took contracts extending over a term of years which have not fully expired?"

MR. HISTED: "Yes, sir."

CHIEF JUSTICE DOSTER: "Are those pleaded here?"

MR. HISTED: "Yes, sir."

CHIEF JUSTICE DOSTER: "And you are asked to be ousted from your franchise to fulfil those contracts as well as other business?"

MR. HISTED: "Yes, sir."

JUSTICE SMITH: "Do you think this would have the effect you state if you were ousted?"

MR. HISTED: "The judgment asked by the plaintiff is absolute prohibition to this company from coming into the state of Kansas and doing any business in the state of Kansas."

MR. QUINTON: "We do not complain of any contract made by this company prior to the passage of the Bush law. We complain only that they failed to comply with the Bush act, and by reason of that failure they have no right to do business. Of course, if they had contracts in the state before that law was passed, there is nothing in this proceding that can touch those, and if the court would overrule that part of their defense, it would simply inject into this case something that is not contemplated."

This remark of Mr. Quinton's is explained by the naive attempt of counsel for the book company to have the court overrule this defense as of course.

CHIEF JUSTICE DOSTER: "You don't ask that the company be ousted from its franchise to fulfil the old contracts?"

MR. QUINTON: "No, sir; we do not. We simply complain of their right to do business under this act. That is another matter. The court cannot determine what contracts it affects now and what it don't affect."

MR. HISTED: "Have we a right in trying this case to adopt the same rules of procedure and evidence that would obtain in a district court, and to interpret the position of the party by his pleadings and the orders obtained, and has he a right to come in and interpret them on the trial?"

CHIEF JUSTICE DOSTER: "Where a party disavows an intention to ask certain relief, the court will act upon his disavowal. They disavow any intention to oust you from the fulfilment of those old contracts. We will bear that in mind when we come to render judgment, in case it should be adverse to you in any particular."

(Printed record, p. 40.)

On cross-examination of a witness for plaintiff in error:

"Have n't you made contracts?"

"With whom?"

"It does n't make any difference whom—in the state of Kansas since 1898?"

MR. HISTED: "*That is not in issue.*"

CHIEF JUSTICE DOSTER: "Suppose it has made contracts—what then?"

MR. QUINTON: "That 's all; I just wanted to show they were doing business."

THE WITNESS: "I thought I stated fully——"

CHIEF JUSTICE DOSTER: "Never mind; the question is withdrawn."

(Printed record, p. 48.)

If the court failed to properly guard the matter in its judgment, the remedy of the plaintiff in error was a motion to that court to do so, not a writ of error alleging that the court had *decided* a federal question against it. We need not argue this proposition. The case is clearly not one con-

templated by the act of Congress as to writs of error to state courts.

In passing upon an appeal to the contract clause of the constitution, made in a case which involved the corporation law of Wisconsin with reference to foreign corporations, this court recently said: "We are not prepared to say that the regulation would be unreasonable or invalid as to such a contract as this, even if enacted after the contract was made."

Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 615.

That case is very much in point here, and with its citation we leave this question.

Occlusion of Courts.

The brief for the plaintiff in error attempts to raise still another question, neither embraced in the assignment of errors nor raised below—the occlusion of the Kansas courts, under a provision of the Bush act, against foreign corporations under certain circumstances.

(Brief for plaintiff in error, pp. 17, 33.)

A corporation is not a citizen within the meaning of the fourth article of the federal constitution as to "privileges and immunities," including the right to resort to the courts of a state, nor is it, as to a state other than that of its creation, "within its jurisdiction," so as to be able to claim the protection of the provision of the fourteenth

amendment as to "the equal protection of the laws."

Blake v. McClung, 172 U. S. 239.

The question was not involved in this case. No question of the kind had yet arisen. And if it should arise, and that portion of the act should be held void, the remainder of the act would not be affected. Whether, that portion being void, the remainder of the act would be affected, would not be a federal question. But nothing of the kind was involved or decided; and "sufficient unto the day is the evil thereof."

THE REAL QUESTION.

From the record brought here, it is apparent that the real object of attack and defense in this case, as distinctly understood by both court and counsel, was the right of the American Book Company, without fully complying with the Bush corporation act, to enter into contractual relations with the State Text-book Commission.

As to the right *to sell* school-books in the state for use in the public schools, no question could arise under the corporation act; for that right depends upon whether a contract has been made with the Text-book Commission. If a valid contract has been made with the commission, the corporation is not only not forbidden to sell books in the state, but is required to do so under penalty of having its bond enforced. If no such valid contract has been made, the corporation cannot sell books in the state, *although it has fully complied with the corporation law*, for it made a misdemeanor for any one to purchase books from it. If, notwithstanding the corporation has not complied with the Bush law, the commission can make a valid contract with it, then it may and must sell books in the state, and it need *never* comply with the Bush law. The only question is the legal power to contract with the commission.

It is the text-book law—not the corporation

act—which interferes with the sale of books for use in the public schools of Kansas. No matter how piously it may have complied with the Bush act, a foreign corporation may sell no school-books, for no one may sell them, without a contract with the Text-book Commission. As to the only transactions involved in this case or intended to be affected by the proceedings or the judgment, or capable of being so affected, the Bush law is involved only in the single question—May the commission lawfully contract with a corporation which has not complied with the law concerning corporations? And that is a mere question of statutory interpretation—not a federal question. The only corporate power attacked by the proceedings, the only corporate power from the exercise of which the book company was to be ousted, the only corporate power which, from the very nature of its business, could have been involved, was the corporate power of entering into contracts with the Text-book Commission. In brief, the only law which in any manner interferes with interstate commerce in the only goods in which the plaintiff in error deals is the act creating the State Text-book Commission, which was not attacked below, is not here attacked, *upon any ground whatever!*

Could that law *be* successfully attacked as an interference with commerce?

As *parens patriæ*, may not a sovereign state

select the text-books its children shall use, fix their price, and arrange for their supply?

"Except so far as its connection with the constitution and laws of the United States alters its position," the state of Kansas "is a sovereign state, possessing all the powers of the most absolute government in the world."

Doyle v. Continental Insurance Co., 94 U. S. 535.

As a sovereign state, it certainly has the right to say with whom it will or will not contract, and with whom its agencies shall or shall not contract; and, like any other sovereign, is not bound to render *any* reason, much less a good one, for its preference. Though this court may hold a statute void, the state may still require its obedience by its own officers and agencies when acting for it or in its name or behalf, and its sovereign act will be beyond the reach of this court. All this was set at rest by the decision already cited — Doyle v. Continental Insurance Co. This statute, whether valid or void as to others, was a *direction of a sovereign state to its own agents not to do business in its behalf with certain corporations.* Had not the state a right to select the persons with whom it would deal? Is it a violation of the interstate-commerce clause of the constitution for a sovereign state to refuse to purchase goods, even if interstate-commerce goods, of a particular corporation? Then it is

also a violation of the commerce clause for a private citizen to refuse to buy of a certain person if he be engaged in interstate commerce!

But, again, the right to assert protection under a provision of the federal constitution may be waived. "A person may, by his acts or omission to act, waive a right which he might otherwise have under the constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a federal one."

Pierce v. Somerset Railway, 171 U. S. 641–648.

When one approaches the Kansas State Textbook Commission with a bid, does he not throw to the winds the protection of the commerce clause of the constitution? The prices at which goods are to be sold are to be fixed, as also the commissions of agents or dealers; the publisher is required to keep a stock on hand at every county-seat; the commerce must be maintained for five years, whether profitable or otherwise. Could either of these regulations survive a single moment if exposed unprotected to the fierce heat of the commerce clause of the constitution? The successful bidder becomes *pro hæc vice* as much an officer or agent of the state as is the state printer, and he, no more than the state printer, can claim the protection of the constitution as if engaged in interstate commerce. His shipments

are not interstate-commerce shipments. They are not made in the ordinary course of open traffic. They are made in obedience to the laws of Kansas, to which, right or wrong, he has expressly agreed uncomplainingly to submit. When a case of such a character as this comes here, it is time to repeat what was said in a recent case:

"Unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that, in the working of a statute, there is some tendency, logically discernible, to interfere with commerce. Practical lines have to be drawn and distinctions of degree must be made."

Diamond Glue Co. v. United States Glue Co., 187 U. S. 611–616.

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